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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

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RANCHERS CATTLEMEN ACTION	)	Cause No. CV-05-06-BLG-RFC
LEGAL FUND UNITED	)	
STOCKGROWERS OF AMERICA,	)	
P.O. Box 30715, Billings, MT 59107,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>AMICUS CURIAE BRIEF OF</b>
	)	<b>THE STATES OF</b>
UNITED STATES DEPARTMENT OF	)	<b>CONNECTICUT, NEW MEXICO,</b>
AGRICULTURE, ANIMAL AND	)	<b>NORTH DAKOTA, MONTANA,</b>
PLANT HEALTH INSPECTION	)	<b>NEVADA, SOUTH DAKOTA,</b>
SERVICE, and ANN M. VENEMAN,	)	<b>AND WEST VIRGINIA IN</b>
IN HER CAPACITY AS THE	)	<b>SUPPORT OF PLAINTIFF'S</b>
SECRETARY OF AGRICULTURE,	)	<b>APPLICATION OF</b>
14th Street and Independence Avenue,	)	<b>PRELIMINARY INJUNCTION</b>
S.W., Washington, DC 20250	)	
	)	
Defendants.	)	

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## INTEREST OF AMICI

As a result of eating food contaminated with bovine spongiform encephalopathy (“BSE”), by December 31, 2003, 139 British citizens had died. Nat’l CJD Surveillance Unit & Dep’t of Infectious & Tropical Diseases, *Creutzfeldt-Jakob Disease Surveillance in the UK: Twelfth Annual Report 2003* at § 2.2 (undated) (hereafter “*UK Report*”).<sup>1</sup> They died of variant Creutzfeldt-Jakob Disease (“vCJD”), or “mad cow disease.” It was predicted that in 2004, the United Kingdom would suffer 27 more such deaths. *Id.* The vCJD outbreak in the UK is referred to as an “epidemic.” *Id.* The U.S. government acknowledges that the vCJD disease “has been linked via scientific and epidemiological studies” to BSE. Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 462 (Jan. 4, 2005) (hereafter “APHIS BSE Supp. Info.”).

The BSE that struck the UK’s cattle herds spread to Canadian cattle. Prompt, forceful action by the United States Department of Agriculture in 2003 protected the Nation’s border and substantially reduced the risk that infected Canadian beef would find its way into America’s food supply.

USDA’s commendable action in 2003 satisfied the foremost responsibility of government, that is, to safeguard the health and welfare of its citizens. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *United States v. Cruikshank*, 92 U.S. 542, 549 (1875). States share this duty with the federal government. As a result, the amici states are compelled to comment on the motion pending before the Court, particularly because the federal government, with its premature decision to reopen the border, fails to protect the amici’s interests. The proposed rule puts the citizens of the

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<sup>1</sup> The Report is at [www.cjd.ed.ac.uk/twelfth/rep2003.htm](http://www.cjd.ed.ac.uk/twelfth/rep2003.htm).

amici states at risk of eating food contaminated with BSE and contracting vCJD. The disease is fatal. Rather than exercise abundant caution to protect Americans, USDA made an early decision to re-open the border and then sought science to support it. The science is suspect.

Along with their public health interest, the amici states have a substantial economic interest in USDA's proposed rule. The amici are cattle producing states. Cattle production is an integral, if not vital, part of their economies.

In North Dakota, for example, there are about 11,000 cattle operations managing 1.7 million animals with a value of \$1.5 billion. N.D. Agricultural Statistics Service, North Dakota Agricultural Statistics 2004, at 136-38 (Aug. 2004) (hereafter "ND Ag Stats."). In Montana, 13,000 ranchers run 2.4 million head of cattle valued at \$2.3 billion.<sup>2</sup> In 2003, these producers generated gross receipts of \$960 million, making cattle production the largest part of the Montana's farm economy.<sup>3</sup> North Dakota cattle producers earned \$690 million in cash receipts in 2003, making cattle production, after wheat production, the second largest component of the state's farm income. ND Ag Stats. at 150. And these earnings have significant links to other parts of the economy. Each dollar received from exporting "livestock from the state 'turns over' about four and a half times within the state." Thor Hertsgaard, F. Larry Leistritz, Arlen Leholm, and Randal Coon, *The North Dakota Input-Output Model: A Tool for Measuring Economic Linkages*, 42 North Dakota Farm Research 36, 37 (Oct. 1984). State legislatures recognize the importance of the BSE issue. The 2005 South Dakota Legislature adopted House Concurrent Resolution No. 1001, a copy of which is attached, requesting that the

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<sup>2</sup> This information is from [www.nass.usda.gov/mt/livestock/catloper.htm](http://www.nass.usda.gov/mt/livestock/catloper.htm) and from [www.nass.usda.gov/mt/livestock/cattle&c.htm](http://www.nass.usda.gov/mt/livestock/cattle&c.htm).

<sup>3</sup> This information is from [www.nass.usda.gov/mt/livestock/c&cpci.htm](http://www.nass.usda.gov/mt/livestock/c&cpci.htm).

border remain closed until USDA takes a number of specific steps. See also H.C.R. 3009 59th N.D. Leg. Ass.

The beef cattle industry plays an important role in the economies of the other amici states. And in some of these states ranches and cattle helped form and are an enduring part of the amici states' history, culture, and identity.

If BSE appears in United States cattle, the domestic and international market for American beef will suffer a severe blow. See R-CALF Mem. in Support of Applc. for Prelim. Injunction at 33-38 (Jan. 31, 2005) (hereafter "R-CALF Memo"). This blow will be felt by ranchers throughout the country. The economic consequences of a USDA misstep are staggering. This is proven by the consequences other countries suffered upon the discovery of BSE. For example, in 2001 when the disease appeared in Japanese cattle, the discovery "ravaged Japan's beef industry." Hun J. Jin and Won W. Koo, *U.S. Meat Exports and Food Safety Information* 1 (Agribusiness & Applied Eco. Rpt. No. 514, Ctr. for Agric. Pol'y & Trade Studies, N.D. State Univ.) (May 2003).

In sum, the amici states have a significant interest in this case. The public health risks are clear. Economic risks are equally apparent.

## **ARGUMENT**

The standards for preliminary injunctions are fully set forth and discussed in R-CALF's memorandum. R-CALF Memo at 7. R-CALF shows that USDA's proposed rule suffers substantive and procedural flaws, id. at 9-31, and hence, R-CALF is likely to prevail on the merits. R-CALF also shows that it could well suffer irreparable injury if the rule takes effect, and that the balance of hardships and the public interest favor an injunction. Id. at 33-38. This seems acknowledged by the government. "The

introduction and spread of BSE in the US cattle population would have major adverse consequences for that industry. In addition to the loss of cattle to the disease and the expense of controlling it, major overseas markets for US cattle products might be closed.” FDA Center for Veterinary Medicine, *Environmental Assessment for Prohibition of Protein Derived from Ruminant and Mink Tissues in Ruminant Feeds 2* (Oct. 1996).

The Court’s review of the motion should be informed by several considerations. Congress has expressed a national policy to protect the Nation’s food supply. It is “essential” to protect the people’s health and welfare “by assuring that meat and meat food products . . . are wholesome.” 1907 Federal Meat Inspection Act, 21 U.S.C. § 602. See also United States v. Mullens, 583 F.2d 134, 139 (5th Cir. 1978) (the Act “is to ensure a high level” of safety in meat products); Fed’n of Homemakers. v. Hardin, 328 F. Supp. 181, 184 (D.D.C. 1971) (the Act is to benefit consumers and give them confidence in meat products). Congress has also stated that controlling animal diseases is “essential to protect animal health, the health and welfare of the people . . . [and] the economic interests of the livestock and related industries of the United States.” 2002 Animal Health Protection Act, 7 USC § 8301(1). The proposed rule doesn’t honor the cautionary and protective purposes of these federal laws. And it doesn’t require that Canadian beef be labeled “Canadian beef,” which would allow U.S. consumers to make informed food choices.

Even if temporarily enjoining the rule causes economic harm to the meat packing industry, the Court should be guided by a District of Columbia ruling in a similar situation. “As to the harm to the meat packing industry, Congress has unequivocally

determined that public health is to take precedence over commercial interests in this matter.” Cnty. Nutrition Inst. v. Butz, 420 F. Supp. 751, 757 (D.D.C. 1976).

Recent events support the injunction. There were only two confirmed cases of BSE traceable to Canadian cattle when the USDA developed and considered the effects of its proposed rule. On January 2nd and January 11th of 2005, however, BSE was confirmed to have infected two more Canadian cows. Ctr. for Disease Control, “BSE and CJD Information and Resources” (hereafter “CDC Report”).<sup>4</sup> These new BSE cases require reassessment of USDA analyses presuming a “very low” presence of BSE and conclusions about the “very low” risks if the border is opened. R-CALF criticized such presumptions and conclusions. E.g., R-CALF Memo at 10. R-CALF’s concerns seem confirmed by the two new BSE cases.

Further, one of these cows was born in March of 1998. *CDC Report*. The birth date is significant because it is after the Canadian “feed ban” was instituted. Id. The ban went into effect in 1997. Id. It is a key part of Canada’s effort to control the disease and of USDA’s rationale that the risk to U.S. interests is low. E.g., APHIS BSE Supp. Info., 70 Fed. Reg. at 467 (Canada’s feed ban is a “crucial element” to prevent the spread of BSE). But it now appears that the feed ban may not be as effective as anticipated and as asserted. In addition, Canada has yet to fully evaluate the ban’s effectiveness.

[Canadian Food Inspection Agency] officials are preparing to undertake a review of Canada’s feed ban. This process will examine the effectiveness of industry’s compliance with the ban in limiting the spread of BSE. The review will include participation from international animal health and feed experts.<sup>5</sup>

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<sup>4</sup> The Report is at [www.cdc.gov/ncidod/diseases/cjd/cjd.htm](http://www.cdc.gov/ncidod/diseases/cjd/cjd.htm).

<sup>5</sup> This quote is from the Canadian Food Inspection Agency’s website in a section entitled “Latest Information (as of January 12, 2005).” The website is: [www.inspection.gc.ca/english/anim/heasan/disemala/bseesb/situatone.shtml](http://www.inspection.gc.ca/english/anim/heasan/disemala/bseesb/situatone.shtml).

USDA should wait until Canada evaluates and proves the feed ban's effectiveness before relying on it to justify opening the border. Further, the proposed rule requires that the Canadian feed ban be equivalent to the U.S. ban. APHIS BSE Supp. Info., 70 Fed. Reg. at 504. The U.S. is evaluating its own feed ban. *Id.* at 466, 504. Until this review is complete, the proposed rule should be withheld.

USDA seems to recognize the significance of the two recent BSE discoveries. On February 9, 2005, USDA announced that it would not fully implement the proposed rule on the March 7th effective date. USDA Press Release (Feb. 9, 2005). Imports of Canadian beef from animals 30 months or older will remain prohibited. *Id.* The rest of the rule will go into effect. USDA's rationale for this change is that its "ongoing investigations into the recent finds of BSE in Canada . . . are not complete." *Id.* USDA acknowledges that more work needs to be done. The amici states heartily agree, and while it is being undertaken, the rule's implementation, a rule that reverses longstanding policy to exclude meat and animals from countries with BSE, should be delayed. A delay allows the Court an opportunity to fully review the rule and the procedures by which it was adopted.

## **CONCLUSION**

There are uncertainties with USDA's proposed rule. It risks public health. It risks economic disruption. Consequently, the amici states support the Application for Preliminary Injunction, which seeks only measured relief. It asks only that the rule's implementation be delayed until the Court can consider the merits of R-CALF's claims. The threats are great. Delay is prudent and largely harmless.

Respectfully submitted this 16th day of February, 2005.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Amicus Curiae Brief of the States of Connecticut, New Mexico, North Dakota, Montana, Nevada, South Dakota, and West Virginia in Support of Plaintiff's Application of Preliminary Injunction to be mailed to:

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